(2)
Supreme Court, U.S.
FILED
95 16 96 APR 19 1996
OFFICE OF THE CLERK

No. 95-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN CHARNEY, ALICE CHARNEY, JOHN CHARNEY, JR., AND BRIAN CHARNEY, a minor, by John Charney, his guardian,

Petitioners,

--v.--

ELAINE B. PANITZ,

Respondents.

Petition For a Writ of Certiorari To The Superior Court of Pennsylvania

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

KENNETH W. BEHREND
Behrend and Ernsberger
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

Attorney for Petitioners

58pp

TABLE OF CONTENTS

PAGE

Charney v. Panitz, No. 17 W.D. Appeal Docket 1995 (Pa. January 18, 1996) (Order Dismissing Appeal). 1a

Charney v. Panitz, No. 459 W.D. Allocatur Dkt. 1994 (Pa. March 6, 1995) (Order Granting Petition for Allowance of Appeal) 2a

Charney v. Panitz, No. 2033 Pittsburgh 1993 (Pa. Super. Ct. July 27, 1994) (Memorandum Affirming Dismissal of Plaintiffs' Claims). 3a

Charney v. Panitz, No. 2033 Pittsburgh 1993 (Pa. Super. Ct. July 27, 1994) (Judgment) 6a

Charney v. Panitz, No. 877 of 1993 (Pa. Ct. Comm. Pl. November 22, 1993) (Opinion and Order Sustaining Defendant's Preliminary Objections). 7a

Amended Complaint 10a

Defendant Elaine P. Panitz, M.D.'s Preliminary Objections to Plaintiffs' Amended Complaint 33a

Plaintiffs' Answer to Preliminary Objections of Defendant Elaine P. Panitz, M.D. 43a

Expert Report of Elaine B. Painitz, M.D.P.A. 51a

J-130-1995
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

	: No. 17 W.D. Appeal Docket 1995
JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY as parent and natural guardian of BRIAN CHARNEY, a minor, Appellants,	: Appeal from the Order of the Superior Court at No. 2033 Pittsburgh, 1993, entered July 27, 1994, affirming the Order of the Court of Common Pleas of Westmoreland County, Civil Division at No. 877 of 1993, entered November 22, 1993.
v.	:
ELAINE B. PANITZ, Appellee.	:
	: ARGUED: September 19, 1995

ORDER

PER CURIAM **DECIDED: January 18, 1996**

The appeal is dismissed as having been improvidently granted.

Mr. Justice Montemuro, who was sitting by designation, did not participate in the decision of this case.

JUDGEMENT ENTERED THIS 18TH DAY OF JANUARY 1996

/s/ Amy J. Ceraso
DEPUTY PROTHONOTARY

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JOHN CHARNEY AND ALICE CHARNEY, HIS WIFE, AND JOHN CHARNEY, JR., THEIR SON, AND JOHN CHARNEY, AS PARENT AND NATURAL GUARDIAN OF BRIAN CHARNEY, A MINOR, Petitioners,	:	No. 459 W.D. Allocatur Dkt. 1994
v.	:	
ELAINE B. PANITZ, Respondent.	:	Petition for Allowance of Appeal from the order of the Superior Court

ORDER

PER CURIAM:

AND NOW this 6th day of March, 1995, the Petition for Allowance of Appeal is GRANTED. Petitioners' Petition for Consolidation with the Petition for Allowance of Appeal at No. 647 W.D. Allocatur Docket 1993 is DENIED as moot.

Mr. Justice Montemuro is sitting by designation.

A True Copy Irma T. Gardner
as of: March 6, 1995
Test: /s/ Irma T. Gardner
Deputy Prothonotary
Supreme Court of Pennsylvania

J. A24047/94 - 1

JOHN CHARNEY AND ALICE CHARNEY, HIS WIFE, AND JOHN CHARNEY, JR., THEIR SON AND JOHN CHARNEY AS THE PARENT AND NATURAL GUARDIAN OF BRIAN CHARNEY, A MINOR, APPELLANT	:	IN THE SUPERIOR COURT PENNSYLVANIA
V.	:	
ELAINE B. PANITZ, APPELLEE	:	NO. 02033 PITTSBURGH 1993

Appeal from the Order Entered November 22, 1993, In the Court of Common Pleas of Westmoreland County, CIVIL, No. 877 of 1993 Term.

BEFORE: BECK, HUDOCK, and CERCONE, JJ.

MEMORANDUM: Date: July 27, 1994

This is an appeal from an order sustaining appellee Dr. Elaine Panitz's preliminary objections and dismissing appellants' complaint. For the reasons stated herein, we affirm the order of the trial court and remand for the trial court to assess attorney's fees.

The factual and procedural history is summarized as follows. The Charney family (appellants) initiated an action against Crawford Construction Company alleging that they had sustained injuries as a result of being exposed to formaldehyde present in building materials. Appellee Panitz was employed as an expert witness to support appellants' personal injury action. Panitz testified at trial that in her opinion appellants' injuries had been caused by the formaldehyde. However, when Panitz was cross-

examined about the lack of sensitization of cigarette smokers who are regularly exposed to formaldehyde, she failed to explain the inconsistency in her testimony. Panitz later informed appellants that prior to trial she had realized that her conclusions regarding the formaldehyde sensitization of cigarette smokers was inaccurate.

A verdict unfavorable to appellant was returned in the underlying action. Appellant then filed a complaint against Panitz alleging breach of contract, negligence, negligent misrepresentation, and gross negligence. Panitz filed preliminary objections to appellants' complaint. The trial court sustained the preliminary objections and dismissed the entire complaint. This appeal followed.

On appeal, appellants contend that the trial court erred in extending the absolute testimonial privilege to Panitz's pre-trial representations. The argument raised in the instant appeal is the precise argument raised and rejected by this court in Panitz v. Behrend, 632 A.2d 562 (Pa. Super. 1993). To the extent appellants ask us to revisit this issue, we note that absent reversal by the Supreme Court our decision in Behrend is controlling authority. Commonwealth v. Leib, 588 A.2d 922, 932 (Pa. Super. 1991). Accordingly, we find no error.

As a separate and additional matter, Panitz contends that appellants' appeal is frivolous and requests an award of counsel fees pursuant to Pa.R.A.P. 2744. An appeal is considered frivolous when the realistic chances of ultimate success are slight and continuation of the contest is unreasonable. Murphy v. Murphy, 699 A.2d 647 (Pa. Super. 1991). See also Jackson v. Modern

Mailers, Inc., 537 A.2d 878 (Pa. Super. 1988). Under the circumstances of this case, an award of counsel fees to Panitz under Pa.R.A.P. 2744 is warranted. Hence, on this issue alone, we remand to the trial court to assess the amount of counsel fees.

The trial court's order is affirmed. The matter is remanded for an assessment of counsel fees. Jurisdiction is relinquished.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

JOHN CHARNEY AND ALICE CHARNEY HIS WIFE, AND JOHN CHARNEY, JR., THEIR SON AND JOHN CHARNEY AS THE PARENT AND NATURAL GUARDIAN OF BRIAN CHARNEY, A MINOR,	:	
APPELLANT	:	
VS.	:	
ELAINE B. PANITZ, APPELLEE	:	NO. 2033 PITTSBURGH 1993

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Westmoreland County be, and the same is hereby affirmed. The matter is remanded for an assessment of counsel fees. Jurisdiction is relinquished.

BY THE COURT:

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: JULY 27, 1994

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA

CIVIL DIVISION

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as the parent and natural guardian of BRIAN CHARNEY, minor, Plaintiffs	)	
vs.	)	Court en Banc No. 877 of 1993
ELAINE B. PANITZ, Defendant	)	

OPINION

This matter comes before the Court upon the Preliminary Objections of the Defendant Elaine B. Panitz.

The Plaintiffs have filed an Amended Complaint alleging that the Defendant fraudulently and negligently provided expert testimony for them in a case in which they were plaintiffs. The Plaintiffs alleged that the Defendant promised to provide specific testimony for them at the trial of Charney v. Crawford Construction Co., No. 5306 of 1984 (Westmoreland). The Defendant provided expert testimony at trial and the Plaintiff allege that she failed to answer questions on cross examination as she had represented she would answer. The Plaintiff seeks damages in the amount that they allege they would have recovered in Charney v. Crawford Construction Co. if the Defendant's testimony would have been given as represented.

The Defendant argues that the Plaintiffs have no cause of action against her. She requests that the cause of action against her be dismissed based upon the absolute privilege protecting testimony at trial.

As a result of the trial Charney v. Crawford Construction Co., the Defendant filed suit in Allegheny County seeking the payment of her expert witness fees. A counterclaim was filed against the Defendant alleging the same cause of action as set forth in the above-captioned case. The counterclaim was dismissed by Judge Wettick based upon the absolute privilege relating to testimony at trial. Panitz v. Behrend, 141 P.L.J. 203 (1993). See also Post v. Mendel, 510 Pa. 213, 507 A.2d 351 (1986); Clodgo v Bowman, 411 Pa. Super. 267, 601 A.2d 342 (1992).

The decision of Judge Wettick was affirmed by the Superior Court. Panitz v. Behrend, No. 399 of 1993 (Pa. Super. 1993). The Superior Court specifically noted that the privilege protects testimony given at trial and further extends to pre-trial communications. Panitz, No. 399 of 1993 at 5. See also Moses v. v. McWilliams, 379 Pa. Super. 150, 549 A.2d 950 (1988).

The Superior Court addressed the issue before this Court in Panitz. In addition, this Court is bound by the case law preceding Panitz governing the issues of privilege as to communications in judicial proceedings. The Plaintiffs' Complaint fails to state a cause of action.

The Court will enter the following Order:

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as the parent and natural guardian of BRIAN CHARNEY, minor, Plaintiffs	)	
	)	Court en Banc
vs.	)	No. 877 of 1993
ELAINE B. PANITZ, Defendant	)	

ORDER OF COURT

AND NOW, to wit, this 22nd day of November, 1993, the Preliminary Objections of the Defendant Elaine P. Panitz to the Plaintiffs' Amended Complaint are granted. The Amended Complaint against the Defendant is dismissed.

BY THE COURT:

/s/
Bernard F. Scherer, Judge

ATTEST:

Prothonotary

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as the parent and natural guardian of BRIAN CHARNEY, a minor,

Plaintiffs,

v.

ELAINE B. PANITZ,

Defendant.

CIVIL DIVISION

NO. 877 OF TERM, 1993

CODE:

AMENDED COMPLAINT IN CIVIL ACTION

Filed on behalf of John Charney, Alice Charney, John Charney, Jr., and Brian Charney, Plaintiffs

Counsel of Record for these parties:

Kenneth W. Behrend
PA. I.D. No. 00406
BEHREND AND ERNSBERGER

Firm No. 018
2400 Grant Building
Pittsburgh, PA 15219

(412) 391-2515

JURY TRIAL DEMANDED

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA

CIVIL DIVISION

NOTICE TO DEFEND AND CLAIM RIGHTS

TO THE ABOVE DEFENDANT(S):

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff or defendant. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

WESTMORELAND BAR ASSOCIATION
129 NORTH PENNSYLVANIA AVENUE
GREENSBURG, PA 15601

(412) 834-8490

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son and JOHN CHARNEY, as parent and natural guardian of BRIAN CHARNEY, a minor,	: COURT OF COMMON PLEAS :WESTMORELAND COUNTY : : CIVIL ACTION - LAW : : NO. 877 OF TERM, 1993
Plaintiffs,	:
v.	:
ELAINE B. PANITZ,	:
Defendant.	:

AMENDED COMPLAINT

AND NOW, comes the Plaintiffs, John Charney and Alice Charney, his wife, and John Charney Jr., their son, and John Charney as the parent and natural guardian of Brian Charney, a minor, by and through their attorney, Kenneth W. Behrend, and the law firm of Behrend and Ernsberger, and file the within Amended Complaint and in support thereof avers the following:

FACTUAL BACKGROUND

1. The Plaintiffs John Charney, his wife Alice Charney and their sons John Charney Jr. and Brian Charney are individuals who reside in Westmoreland County, Pennsylvania at 10 Carlisle Drive, R.D. #1, Irwin, Pennsylvania.

2. Defendant Elaine B. Panitz, M.D., is an expert medical witness who offers her professional services of providing expert medical opinions for use in civil litigation throughout Pennsylvania and in Westmoreland County and who resides in Princeton, New Jersey.

3. Plaintiffs had initiated a suit in Westmoreland County, Charney v. Crawford Construction Company, claiming injuries as a result of formaldehyde poisoning from outgassing materials used in the construction of their home. Formaldehyde sensitization was a rare area of litigation at that time and the Plaintiffs needed an expert that had a sound knowledge of the subject and familiarity with the medical literature.

4. In March, 1990, the Defendant agreed to review medical records, conduct a physical examination of each Plaintiff and provide an expert medical opinion regarding the Plaintiffs' claim of formaldehyde poisoning. On March 30, 1990, the Defendant was sent records of the Plaintiffs' medical treatment and history along with a letter from Plaintiffs' counsel requesting this Defendant's expert medical opinion as to whether or not the Plaintiffs had suffered formaldehyde injuries, and if they had, the extent of their sensitivity to formaldehyde and any other chemicals and how this might affect their ability to work. Additional medical records were sent to the Defendant for her review on April 6, 1990 and on April 10, 1990.

5. On April 13, 1990, the Defendant sent a letter by fax to the Plaintiffs' attorney agreeing to examine the Plaintiffs on April 18, 1990, with a retainer of $3,900 to be paid in advance.

6. On April 17, 1990, the Defendant sent to the Plaintiffs' legal counsel six (6) volumes of this Defendant's deposition testimony from an earlier lawsuit, the Alaskan "Crown Point Litigation", which involved a formaldehyde spill and exposure. This was presented to the Plaintiffs as the Defendant's expert medical opinion on formaldehyde sensitization and represented the extent and nature of the testimony she would give in the Plaintiffs' case on various formaldehyde sensitization issues.

7. A serious issue in the area of formaldehyde sensitization is that of tobacco smokers and their alleged exposure to high levels of formaldehyde and apparent lack of formaldehyde sensitization reactions. This was important not only from the standpoint that one of the Plaintiffs had been a smoker once, but because it challenged the assertion that it was even possible for people to become sensitized to formaldehyde. Defendant Panitz

opined that exposure to .1 to .2 parts per million (ppm) of formaldehyde was sufficient to cause sensitization in people; however, tobacco smoke can contain as much as 40 ppm of formaldehyde, and yet most smokers show no signs of formaldehyde sensitization. Failure to satisfactorily explain this paradox would undermine the Plaintiffs' entire case.

8. The Defendant's opinion was clear from the "Crown Point Litigation" depositions that:

a. people can become sensitized and still smoke;
b. forty parts per million (40ppm) of formaldehyde in the smoke does not necessarily translate to the same number in the lungs;
c. it is possible that smokers do react and are simply denying the sensitization reaction; and
d. the sensitization reaction might be masked by the regular irritative symptoms caused by the cigarette smoke.

9. On April 18, 1990, Defendant traveled to Pittsburgh to perform a history and physical examination of the Plaintiffs. She prepared and delivered to the Plaintiffs an expert report based on the physical examinations performed in Pennsylvania. The Plaintiffs, John and Alice Charney, paid the Defendant $3,900.00 for this work by personal check.

10. On May 14, 1990, the Defendant provided her report to the Plaintiff's based on her examination of the Plaintiffs and a review of their history and medical records. Her charge for the report was $245.00 and was paid by the Plaintiffs. There was no indication in the reports nor at any time did the Defendant notify the Plaintiffs or their counsel any intention to give testimony contrary to her opinions clearly stated in the "Crown Point Litigation" depositions.

11. The Defendant continued to correspond with the Plaintiffs and their counsel and expressed her willingness to offer her expert opinions into testimony at trial. A letter from the Defendant on January 7, 1991 conveyed her agreement to do so for a retainer of $5,100.00.

12. The Defendant in this action is a medical doctor who

derives 90% of her income by giving testimony as an expert witness. She is a New Jersey resident and was referred to the defendants by a medical doctor in California. She was selected as an expert witness in the case of Charney vs. Crawford Construction Co. in Greensburg, Pennsylvania, because she asserted she was knowledgeable about the effects of formaldehyde gas on individuals, and because she had performed similar expert witness services for attorneys in Alaska and Florida. She was indicated she could respond convincingly to cross examination and support what she said with medical evidence.

13. The Plaintiffs reasonably expected that Defendant Elaine Panitz would be able to respond to cross examination about formaldehyde in tobacco smoke and that she would have medical proof for what she had to say.

14. At no time did the Defendant indicate to the Plaintiffs or their attorneys that she would change her testimony on formaldehyde in tobacco smoke from what it had been when she had testified in the "Crown Point Litigation".

15. The Defendant testified at trial beginning February 7, 1991, and at that time the issue of formaldehyde in tobacco smoke was raised by defense counsel. The Defendant Elaine Panitz then changed her testimony from what she had testified to in the Alaskan "Crown Point Litigation" and instead supported the assertion that 40 parts per million of formaldehyde in tobacco smoke translates to a like amount in the lungs, and that a pack-a-day smoker inhales 1,430 parts per million total aldehydes, most of which is formaldehyde, in the course of a single day.

16. The Defendant further testified that any sensitized individual generally has great difficulty with being in the presence of smoke, but then offered no testimony to explain why a smoker who appears to be exposed to high levels of formaldehyde does not seem to exhibit symptoms of being sensitized to formaldehyde.

17. The Defendant Elaine Panitz, completely contrary to the testimony she indicated to the Plaintiffs she would give and contrary to the testimony she had given in earlier cases, then fell silent and failed to offer any of the four explanations for the apparent lack of smoker sensitization that she gave in the "Crown

Point Litigation" depositions. She failed to say that people can become sensitized and still smoke; that forty parts per million formaldehyde in the smoke does not necessarily translate to the same number in the lungs; that it is possible that smokers do react and they are simply denying the sensitization reaction; and that the sensitization reaction might be masked by the regular irritative symptoms caused by cigarette smoke. She fully supported the figures on formaldehyde inhalation offered by the defense counsel although she had told the Plaintiffs that her testimony regarding such figures would be entirely different; nor had she ever expressed to the Plaintiffs her intention to testify to something radically different, especially on such a pivotal part of her testimony.

18. The Defendant Elaine Panitz further testified that this was the first time she ever testified in court on the subject of formaldehyde sensitization, but failed to explain that she had given sworn testimony in other cases by deposition, leaving the clear impression that she was inexperienced in this field.

19. After the Defendant Elaine Panitz left the witness stand, she told the Plaintiffs' counsel that she could not explain why tobacco smokers did not experience sensitization reaction, that the medical literature was silent on the subject, and also that she now thought that the full 40 parts per million of formaldehyde in tobacco smoke could be absorbed by the body not only through the lungs, but also through the nasal passages and eventually work its way into the bloodstream. She did not and could not explain why she had expressed to the Plaintiffs and their counsel that her testimony would be one thing, when in fact, it was entirely different.

20. This failure to explain why tobacco smokers did not experience sensitization reactions destroyed her credibility and struck a mortal blow to the very heart of the Plaintiff's case as defense counsel was able to argue in a very short closing statement that people do not become sensitized to formaldehyde at all. Sensitization is not seen even among those who experience high levels of formaldehyde exposure, such as those who smoke tobacco.

21. Defendant Elaine Panitz misled the Plaintiffs and their

counsel when she delivered the Crown Point Deposition transcript and indicated that she was prepared to testify on their behalf in support of the opinions she had given before.

22. The Defendant willfully, wantonly, and/or negligently and with reckless disregard of the consequences deceived the Plaintiffs when she represented to them her expert medical opinion on a critical matter in the Plaintiffs' case, and her willingness to testify consistent with that opinion, when in fact, her testimony on the issue was entirely different and was instead detrimental to the case.

23. The Defendant willfully, wantonly, deceitfully and/or negligently and with reckless disregard of the consequences induced the Plaintiff to contract for her services knowing that the Plaintiffs would expect her to give testimony consistent with Defendant's prior testimony in earlier litigation, or that the Defendant would advise the Plaintiffs or their counsel if the Defendant's expert medical opinion had changed since that time.

24. Defendant's failure to notify the Plaintiffs before trial that her testimony at trial would be different that what she had represented to the Plaintiffs --that her expert opinion was consistent with her testimony in the "Crown Point Litigation"-- was a breach of contract and a fraud upon the Plaintiffs.

COUNT I
BREACH OF CONTRACT

25. Plaintiff incorporates Paragraphs 1 through 24 as if the same were set forth herein at length.

26. Defendant represented herself to the Plaintiffs John and Alice Charney to be a medical expert competent to give expert medical testimony concerning formaldehyde poisoning and experienced.

27. Defendant represented to the Plaintiffs and their counsel that she had certain and definite expert medical opinions regarding formaldehyde sensitization and that those opinions were, in fact, the same opinions she set forth under oath in a deposition she gave as part of an Alaskan lawsuit known as "Crown Point Litigation"; the relevant portion of such deposition is attached and

marked exhibit A.

28. Defendant agreed to have medical proof for the testimony she was expected to give.

29. In reliance on the Defendant's representations, the Plaintiffs entered into a contract with the Defendant whereby the Defendant, in consideration for $3,900.00 from the Plaintiffs, agreed to conduct a medical examination of the Plaintiffs and prepare an expert report. Defendant was to provide the Plaintiffs her honest evaluation of their case, from a medical and scientific standpoint, and advise the Plaintiffs if her expert medical opinions were supportive of their case or if the Plaintiffs' case had medical or scientific flaws. Further, the Defendant agreed to testify on the Plaintiff's behalf at the Plaintiffs' trial in consideration for an additional fee including a, $5,100.00 pre-trial retainer.

30. Plaintiffs paid the Defendant $3,900. 00 by personal check for her services in examining the Plaintiffs and preparing an expert report. The Defendant also was paid $5,100.00 to cover her estimate of the time required for testimony and travel expenses.

31. At trial, the Defendant changed her testimony from what she had previously testified to under oath according to the deposition she presented to Plaintiffs and she failed to have medical proof to support her testimony.

32. Plaintiffs reasonably relied on the Defendant to give testimony as she had in her deposition and reasonably relied on Defendant to have medical proof for her expected testimony.

33. Defendant's testimony was crucial to the Plaintiff's case and the Plaintiffs and their counsel relied upon the Defendant's representations in evaluating their case, making a judgment of the chances of a successful outcome verses an early settlement, or whether to go forward with the litigation and the expenses it would incur.

34. Plaintiffs reasonably relied on the Defendant to advise them or their counsel if she intended to change her expert medical testimony on issues being litigated in the Plaintiffs' suit from the expert medical opinion the Defendant represented as her own and as evidenced in the deposition from the "Crown Point Litigation".

35. As a direct and legal result of Defendant's failure to give testimony according to her previous deposition and the representations made to the Plaintiffs and their counsel, and of her failure to have medical proof to support those opinions, and of her failure to notify the Plaintiffs or their counsel of her intention to change or alter her testimony from what she had represented to the Plaintiffs and their counsel, the Plaintiffs have suffered the following injuries and damages:

a. The Defendant Elaine Panitz was a substantial contributing factor in the subsequent loss of the Plaintiffs' formaldehyde poisoning suit and the substantial award for damages it would have provided them to make them whole.

b. The Plaintiffs were deprived of the opportunity to make an informed evaluation of their case and therefore was led to litigate the case, based on false information supplied by the Defendant Panitz and her failure to provide an honest evaluation of the case prior to trial, rather than consider a settlement out of court.

c. Plaintiffs have paid Defendant $9,000.00 and have been billed by the Defendant for an additional $5,330.26 for services which all came to no avail as a result of Defendant's breach of contract.

d. Plaintiffs have incurred substantial legal fees and expenses in reliance on Defendant's agreement to testify according to her representations. Much of these fees and expenses could have been avoided if the Defendant had advised the Plaintiffs of her change of opinion prior to trial.

WHEREFORE, Plaintiffs demand judgment against the Defendant in an amount in excess of $30,000 and any other relief that the court deems necessary or proper.

COUNT II
NEGLIGENCE

36. Paragraphs 1 through 35 are incorporated herein as if

the same were set forth at length.

37. Defendant had a duty to express her opinions with a reasonable degree of medical and/or scientific certainty.

38. Defendant had a duty to accurately express and communicate her opinion and her qualifications prior to trial so that the Plaintiffs would know that Defendant was ready to testify at trial.

39. Defendant had a duty to prepare for trial and be ready with medical and/or scientific support for the opinions she was to express at trial.

40. Defendant had a duty to accurately express her knowledge, skills and qualifications at trial and to be prepared to adequately defend herself under cross-examination at trial.

41. Defendant had a duty to inform Plaintiffs, prior to trial, when she finds that she is unable to express her opinions with a reasonable degree of medical and/or scientific certainty or if she had any intention to change or alter her testimony from what she had represented to the Plaintiffs or their counsel.

42. Defendant had a duty to inform the Plaintiffs, prior to trial, when she found that she no longer has the confidence in her opinions that she had earlier stated or implied.

43. Defendant negligently failed to:

a. express her opinions with a reasonable degree of medical and/or scientific certainty.

b. accurately express and communicate her opinion and her qualifications prior to trial so that Plaintiffs would know that Defendant was ready to testify at trial.

c. prepare for trial and be ready with medical and/or scientific support for the opinions she was to express at trial.

d. inform Plaintiffs, prior to trial, when she finds that she is unable to express her opinions with a reasonable degree of medical and/or scientific certainty.

e. inform the Plaintiffs, prior to trial, when she found that she no longer has the confidence in her

opinions that she had earlier stated or implied or if she had any intention to change or alter her testimony for whatever reason from what she had represented to the Plaintiffs to be her honest and truthful testimony.

44. Plaintiffs reasonably relied on the Defendant to give testimony as she had in her deposition and reasonably relied on Defendant to have medical proof for her expected testimony.

45. Defendant's testimony was crucial to the Plaintiffs' case and the Plaintiffs and their counsel relied upon the Defendant's representations in evaluating their case, making a judgment of the chances of a successful outcome verses an early settlement, or whether to go forward with the litigation and the expenses it would incur.

46. Plaintiffs reasonably relied on the Defendant to advise them or their counsel if she intended to change her expert medical testimony on issues being litigated in the Plaintiffs' suit from the expert medical opinion the Defendant represented as her own and as evidenced in the deposition from the "Crown Point Litigation".

47. As a direct and legal result of Defendant's failure to give testimony according to her previous deposition and the representations made to the Plaintiffs and their counsel, and of her failure to have medical proof to support those opinions, and of her failure to notify the Plaintiffs or their counsel of her intention to change or alter her testimony from what she had represented to the Plaintiffs and their counsel, the Plaintiffs have suffered the following injuries and damages:

a. The Defendant Elaine Panitz was a substantial contributing factor in the subsequent loss of the Plaintiffs' formaldehyde poisoning suit and the substantial award for damages it would have provided them to make them whole.

b. The Plaintiffs were deprived of the opportunity to make an informed evaluation of their case and therefore was led to litigate the case, based on false information supplied by the Defendant Panitz and her failure to provide an honest evaluation of the case prior to trial, rather than consider a

settlement out of court.

c. Plaintiffs have paid Defendant $9,000.00 and have been billed by the Defendant for an additional $5,330.26 for services which all came to no avail as a result of Defendant's breach of contract.

d. Plaintiffs have incurred substantial legal fees and expenses in reliance on Defendant's agreement to testify according to her representations. Much of these fees and expenses could have been avoided if the Defendant had advised the Plaintiffs of her change of opinion prior to trial.

WHEREFORE, the Plaintiffs demand judgment for compensatory against the Defendant in an amount in excess of $30,000.00 and any other such relief the court deems necessary or proper.

COUNT III

NEGLIGENT MISREPRESENTATION

(Restatement of Torts, Second, Section 552

48. Paragraphs I through 47 are incorporated herein as if the same were set forth at length.

49. Defendant in the course of her business, and profession and employment supplied false information for the guidance of the Plaintiffs in their business transactions.

50. Defendant represented to Plaintiffs that she was ready for trial.

51. Defendant represented that she was prepared to respond to questions regarding the sensitization of individuals to formaldehyde.

52. These representations were misrepresentations because she was not prepared to respond as she has stated or implied.

53. Defendant represented that she was prepared to explain why tobacco smokers who are exposed to formaldehyde in concentrations in excess of 40 ppm in tobacco smoke do not exhibit sensitization reactions.

54. Defendant represented that she was prepared to disagree with the proposition that 40 ppm formaldehyde in tobacco

smoke meant that 40 ppm was pulled into the lung; before trial she said in her Crown Point deposition:"I'm not sure that that means the individual is pulling in 40 parts per million formaldehyde into his lungs."

55. Defendant stated that she had read substantially all the medical literature on the subject and reasonably implied that she had some medical and/or scientific basis for her unwillingness to agree that 40 parts per million formaldehyde is pulled into the lungs.

56. This representation was a misrepresentation because she was not prepared to disagree, and at trial did not contest the assertion that tobacco smokers inhale 40 parts per million formaldehyde into the lung.

57. Defendant represented that she was prepared to say that in her opinion: "It's possible that they [tobacco smokers] do react and they are suppressing the symptoms and don't wish to recognize that the cigarette smoke is bothering them, that's possible, but I otherwise can't explain it."

58. Again she implied that having read substantially all the literature on the subject of formaldehyde sensitization that there was some medical and/or scientific basis for her opinion that tobacco smokers do react and are suppressing their symptoms.

59. This representation was a misrepresentation because she had no medical and/or scientific basis for the opinion and after trial she said there was no medical literature on the subject.

60. Defendant negligently represented her ability to testify on medical issues. She knew that proceeding to trial without a proper basis for her opinions that she stated or implied would create an extreme risk of loss. She proceeded with reckless indifference to the consequences of her conduct.

61. When she learned that she had no medical facts to support the testimony she had offered to give regarding formaldehyde in tobacco smoke, she negligently, and recklessly, failed to tell the Plaintiffs that she was not prepared to testify as she had indicated.

62. Defendant intended that the Plaintiffs would be guided by the information and knew that the Plaintiffs would rely on the

information given in their preparation of the case for trial.

63. Plaintiffs justifiably relied on her to testify and to respond to cross examination as she represented that she would.

64. Defendant negligently supplied information for the guidance of Plaintiffs when she failed to exercise reasonable care or competence in obtaining or communicating the information.

65. Plaintiff a reasonably relied on the Defendant to give testimony as she had in her deposition and reasonably relied on Defendant to have medical proof for her expected testimony.

66. Defendant's testimony was crucial to the Plaintiff's case and the Plaintiffs and their counsel relied upon the Defendant's representations in evaluating their case, the chances of a successful outcome verses an early settlement, or whether to go forward with the litigation and the expenses it would incur.

67. Plaintiffs reasonably relied on the Defendant to advise them or their counsel if her expert medical testimony on issues being litigated in the Plaintiffs' suit changed or differed from the expert medical opinion the Defendant represented as her own, as evidenced in the deposition from the "Crown Point Litigation".

68. As a direct and legal result of Defendant's failure to give testimony according to her previous deposition and the representations made to the Plaintiffs and their counsel, and of her failure to have medical proof to support those opinions, and of her failure to notify the Plaintiffs or their counsel of her intention to change or alter her testimony from what she had represented to the Plaintiffs and their counsel, the Plaintiffs have suffered the following injuries and damages:

a. The Defendant Elaine Panitz was a substantial contributing factor in the subsequent loss of the Plaintiffs' formaldehyde poisoning suit and the substantial award for damages it would have provided them to make them whole.

b. The Plaintiffs were deprived of the opportunity to make an informed evaluation of their case and therefore was led to litigate the case, based on false information supplied by the Defendant Panitz and her failure to provide an honest evaluation of

the case prior to trial, rather than consider a settlement out of court.

c. Plaintiffs have paid Defendant $9,000.00 and have been billed by the Defendant for an additional $5,330.26 for services which all came to no avail as a result of Defendant's breach of contract.

d. Plaintiffs have incurred substantial legal fees and expenses in reliance on Defendant's agreement to testify according to her representations. Much of these fees and expenses could have been avoided if the Defendant had advised the Plaintiffs of her change of opinion prior to trial.

WHEREFORE, the Plaintiffs demand judgment for compensatory and punitive damages against the plaintiff in an amount in excess of $30,000.00 and any other such relief that the court deems necessary or proper.

COUNT IV

GROSS NEGLIGENCE

69. Paragraphs 1 through 68 are incorporated herein as if the same were set forth at length.

70. In the Crown Point Deposition Defendant stated that:

a. people can become sensitized and still smoke;

b. forty parts per million formaldehyde in the smoke does not necessarily translate to the same number in the lungs;

c. that it is possible that smokers do react and they are simply denying the sensitization reaction; and

d. the sensitization reaction might be masked by the regular irritative symptoms, due to cigarette smoke.

71. Prior to trial she found that there were no medical facts to support this testimony.

72. When she learned that she had no medical facts to support the testimony she had offered to give regarding formaldehyde in tobacco smoke, she negligently, and recklessly, failed to tell Plaintiffs that she was not prepared to testify as she had indicated or that she intended to give testimony that

substantially differed from the testimony she had represented to the Plaintiffs reflected her true expert opinion.

73. She knew that proceeding to trial without a proper basis for her opinions that she stated or implied would create an extreme risk of loss. She proceeded with reckless indifference to the consequences of her conduct.

74. Defendant acted with willful wanton and reckless disregard of the truth or falsity of the testimony she had offered to give at trial, and when she learned of her inability to give the required testimony she willfully wantonly and recklessly failed to advise the Plaintiffs and/or their counsel.

75. Defendant demanded and accepted a retainer check in the amount of $5,100.00 knowing that she could not present and defend the testimony she had represented that she would make at trial.

76. Plaintiffs reasonably relied on the Defendant to give testimony as she had in her deposition and reasonably relied on Defendant to have medical proof for her expected testimony.

77. Defendant's testimony was crucial to the Plaintiff's case and the Plaintiffs and their counsel relied upon the Defendant's representations in evaluating their case, the chances of a successful outcome verses an early settlement, or whether to go forward with the litigation and the expenses it would incur.

78. Plaintiffs reasonably relied on the Defendant to advise them or their counsel if her expert medical opinion on issues being litigated in the Plaintiffs' suit changed or differed from the expert medical opinion the Defendant represented as her own now, as in the deposition from the "Crown Point Litigation".

79. As a direct and legal result of Defendant's failure to give testimony according to her previous deposition and the representations made to the Plaintiffs and their counsel, and of her failure to have medical proof to support those opinions, and of her failure to notify the Plaintiffs or their counsel of her intention to change or alter her testimony from what she had represented to the Plaintiffs and their counsel, the Plaintiffs have suffered the following injuries and damages:

a. The Defendant Elaine Panitz was a substantial

contributing factor in the subsequent loss of the Plaintiffs' formaldehyde poisoning suit and the substantial award for damages it would have provided them to make them whole.

b. The Plaintiffs were deprived of the opportunity to make an informed evaluation of their case and therefore was led to litigate the case, based on false information supplied by the Defendant Panitz and her failure to provide an honest evaluation of the case prior to trial, rather than consider a settlement out of court.

c. Plaintiffs have paid Defendant $9,000.00 and have been billed by the Defendant for an additional $5,330.26 for services which all came to no avail as a result of Defendant's breach of contract.

d. Plaintiffs have incurred substantial legal fees and expenses in reliance on Defendant's agreement to testify according to her representations. Much of these fees and expenses could have been avoided if the Defendant had advised the Plaintiffs of her change of opinion prior to trial.

WHEREFORE, the Plaintiffs demand judgment for compensatory and punitive damages against the defendant in an amount in excess of $30,000.00 and any other such relief the court may deem necessary or proper.

Respectfully submitted,
BEHREND & ERNSBERGER

By/s/_____
Kenneth W. Behrend
Attorney for the Plaintiffs

1 198
2 SUPERIOR COURT OF THE STATE OF ALASKA
3 THIRD JUDICIAL DISTRICT
4
5
6) No. 3AN-86-5812 Civil
7 CROWN POINT LITIGATION)
8) VOLUME II
9
10
11 Computer-aided transcript of deposition
12 testimony of ELAINE B. PANITZ, M.D., taken
13 stenographically in the above entitled matter before
14 EDWIN SILVER, Certified Shorthand Reporter and Notary
15 Public of the State of New Jersey, at the offices of
16 SMITH, STRATTON, WISE, HEHER & BRENNAN,
ESQS., 600
17 College Road East, Princeton, NJ 08540, on Tuesday,
18 December 5, 1989, commencing at 8:40 a.m.
19
20
21
22
23 SILVER & RENZI REPORTING SERVICE
24 824 WEST STATE STREET, TRENTON, NJ 08618
25 (609) 989-9191 or (800) 792-8880 (NJ Only)
Silver & Renzi Reporting Service

sensitized tend to have symptoms when they encounter tobacco smoke, although some who are sensitized still manage to smoke.

Q My question was: A person says that smoking doesn't bother him, could he be sensitized to formaldehyde?

A My evaluation of these plaintiffs has been that some of the individuals who are sensitized are still smoking, and I think one or two of them told me that he is not aware of increased symptoms while smoking.

Q But he is still sensitized to formaldehyde?

A I believe so, yes.

Q Even though formaldehyde contains--cigarette smoke contains approximately 40 parts per million of formaldehyde?

A Correct.

Q Well, let's alter the body's immune response. Before the exposure he would react to 80 parts per million and after 60 parts per million, so it really doesn't come into play with tobacco smoke?

I have difficulty understanding how his immune response is altered if he can be exposed to

40 parts per million. It doesn't seem very sensitive.

A No, you can't--the 40 parts per million, it is my understanding that the 40 parts per million represents the formaldehyde generated in, say, a room where there is a cigarette being smoked. The data is from the surgeon general 1979 publication. I believe that's where I have read it.

I'm not sure that that means the individual is pulling in 40 parts per million formaldehyde into his lungs. I don't personally know what the concentration is when you're pulling it into their lungs.

Q Well, if there is 40 parts per million in the smoker in the room, he is exposed to it, either his skin or his eyes or his upper respiratory tract, correct?

A Correct.

Q I'm not limiting myself to the lungs. If an individual can have his skin and eyes and upper respiratory tract exposed to 40 parts per million with no problems, do you consider him sensitized?

A There are some of these individuals who had symptoms in relation to smoking, eye and

respiratory symptoms in relation to smoking, although it's not, in my opinion, possible to detect whether they were having regular irritative symptoms in that situation due to cigarette smoke.

I cannot explain why certain of the individuals who I believe are sensitized to formaldehyde do not react to cigarette smoke when they smoke. It's possible that they do react and they are suppressing the symptoms and don't wish to recognize that the cigarette smoke is bothering them, that's possible, but I otherwise can't explain it.

Q Basically, your diagnosis of sensitization is that an individual experiences more symptoms after exposure to a substance than he did before?

A Correct, and to lower levels.

Q That was my next question.

How do you know what the levels were before and after to which they are exposed that caused the symptoms?

A I'm sorry, could you clarify your question? I'm not sure what you're asking.

Q How do you know the lower--strike that.

How do you know that they are

CERTIFICATE OF SERVICE

I, Kenneth W. Behrend, hereby certify that a true and correct copy of the foregoing Amended Complaint in Civil Action was served upon all counsel of record by U.S. first-class mail, postage prepaid on this 2nd, day of August 1993, as follows:

Alan S. Gold, Esquire
MONAGHAN & GOLD
Manor, Professional Building
7837 Old York Road
Elkins Park, PA 19117

BEHREND AND ERNSBERGER

BY:/s/_____
Kenneth W. Behrend

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY as the parent and natural guardian of BRIAN CHARNEY, a minor, -Plaintiffs	COURT OF COMMON PLEAS WESTMORELAND COUNTY NO. 877 OF TERM, 1993 CIVIL ACTION - LAW

v.

ELAINE P. PANITZ, M.D.,
Defendant

CIVIL COURT EN BANC NOTICE FORM

Name of pleading filed: Preliminary Objections of Defendant, Elaine P. Panitz, M.D. to the Amended Complaint of the Plaintiffs, Along with supporting memorandum of law

Has the above captioned case been previously listed on any Court en Banc list? If yes, name the judge. _XX_ Yes ____No Bernard F. Scherer Judge

If this is a Preliminary Objection to a late joinder of an addition defendant, name the Judge who permitted the joinder. _____ Judge

Is transcript requested? __No__

Present this notice to the Court Administrator's Office for assignment prior to filing the motion.

Date & Time of presentment _____
Judge assigned _____

SERVE THE ORIGINAL AND ONE COPY OF THE MOTION UPON THE COURT ADMINISTRATOR. ATTACH THE WHITE COPY OF THIS NOTICE TO THE FRONT OF THE ORIGINAL MOTION AND FILE WITH THE PROTHONOTARY. SERVE A COPY OF THIS NOTICE AND THE MOTION UPON ALL PARTIES.

You, as the moving party, must file the original and one (1) copy of your brief with the Prothonotary within twenty (20) days of the filing of this motion if no transcript has been requested, and, if a transcript has been requested, within twenty (20) days of receiving notification that the transcript has been filed. In all cases, you must serve copies of your brief on all opposing parties or counsel before or immediately after filing your brief. Certification of Service must be filed within three (3) days of the filing the brief. Failure of the moving party to file a brief or certification of service thereof will result in dismissal of the motion.

The original and one (1) copy of the responding briefs are due within twenty (20) days of the filing of the moving party's briefs. Service must be made on all parties and certification of service must be filed within three (3) days of filing the brief with the Prothonotary and the Court Administrator. You will not be permitted to present oral argument if you fail a responding brief or certification of service.
List Opposing Attorneys and Address:
Kenneth W. Behrend, Esquire, 2400 Grant Building, Pittsburgh, PA 15219, counsel for Plaintiffs

FAILURE OF THE MOVING PARTY TO SERVE A COPY OF ALL MOTIONS AND PLEADINGS OR THE CIVIL COURT EN BANC NOTICE FORM ON ALL OPPOSING COUNSEL WILL RESULT IN THE DISMISSAL OF THE MOTION OR PRELIMINARY OBJECTION. CERTIFICATION OF SERVICE OF THE DOCUMENTS MUST BE FILED WITHIN THREE (3) DAYS OF THE FILING OF THOSE DOCUMENTS WITH THE PROTHONOTARY.

/s/ Alan S. Gold
Attorney for Defendant,
Elaine P. Panitz, M.D.

MONAGHAN & GOLD P.C.
BY: ALAN S. GOLD
ATTY. I.D. NO. 23400
7837 OLD YORK ROAD
ELKINS PARK, PA 19117
(215) 782-1800

ATTORNEY FOR DEFENDANT,
ELAINE P. PANITZ, M.D.

JOHN CHARNEY and ALICE CHARNEY, his wife, JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as parent and natural guardian of BRIAN CHARNEY, a minor,
Plaintiffs

v.

ELAINE P. PANITZ, M.D.,
Defendant

COURT OF COMMON PLEAS
WESTMORELAND COUNTY

NO. 877 OF TERM, 1993

CIVIL ACTION - LAW

ORDER

AND NOW, this day of , 1993 it is hereby ORDERED and DECREED that the Preliminary Objections of Elaine P. Panitz, M.D. to the Amended Complaint of John Charney and Alice Charney, his wife, and John Charney, Jr., their son, and John Charney, as the parent and natural guardian of Brian Charney, a minor are granted and their Amended Complaint is dismissed with prejudice.

BY THE COURT:

_____

J.

Please be advised that you have twenty (20) days in which to respond to the Prel. Object. of Def.

MONAGHAN&GOLD, P.C.
BY: ALAN S. GOLD
ATTY. I.D. NO. 23400
7837 OLD YORK ROAD
ELKINS PARK, PA 19117
(215) 782-1800

ATTORNEY FOR DEFENDANT,
ELAINE P. PANITZ, M.D.

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as the parent and natural guardian of BRIAN CHARNEY, a minor,

Plaintiffs

v.

ELAINE P. PANITZ, M.D.,

Defendant

COURT OF COMMON PLEAS
WESTMORELAND COUNTY

NO. 877 OF TERM, 1993

CIVIL ACTION - LAW

PRELIMINARY OBJECTIONS OF ELAINE P. PANITZ, M.D. TO THE AMENDED COMPLAINT OF THE PLAINTIFFS

Elaine P. Panitz, M.D. (hereinafter referred to as "Dr. Panitz") preliminarily objects to the amended complaint of John Charney and Alice Charney, his wife, and John Charney, Jr., their son, and John Charney, as the parent and natural guardian of Brian Charney, a minor (hereinafter collectively referred to as the "Charneys") and states in support thereof the following:

1. The Charneys have filed a amended complaint

against Dr. Panitz contending that Dr. Panitz failed to testify at trial for them in a case that they had brought against a third party in the manner in which she had promised. A copy of the amended complaint appears hereto as Exhibit "A".

2. According to the amended complaint in the case in which Dr. Panitz agreed to be an expert for the Charney she did testify. The Charneys only complain about what she said.

3. The Charneys possess no cause of action against Dr. Panitz because Dr. Panitz has an absolute privilege protecting anything that she said at trial regardless of her motivation or intent. This identical claim was brought against Dr. Panitz by the Charneys' attorneys in the underlying litigation in a counterclaim to Dr. Panitz's complaint for her expert witness fees. In response to preliminary objections by Dr. Panitz to the counterclaim, Judge Wettick of the Court of Common Pleas of Allegheny County held that the absolute privilege relating to testimony at trial defeated the counterclaim of the Charneys' attorneys. Judge Wettick granted the preliminary objections of Dr. Panitz and dismissed the counterclaim of the attorneys, Behrend & Ernsberger. A copy of that counterclaim is attached hereto as Exhibit "B". It is identical in all respects to the complaint of the Charneys. Judge Wettick issued an opinion to support his ruling. It is reported at 141 P.L.J. 203 (1993). A copy of the opinion appears hereto as Exhibit "C". For the reasons set forth in Judge Wettick's opinion an absolute privilege protects Dr. Panitz's testimony.

4. The Superior Court of Pennsylvania in Clodgo by Clodgo v. Bowman, 441 Pa. Super. 267, 601 A.2d 342 (1992) applied the absolute privilege to a case identical in all important respects to the one now before this Court. In Clodgo a mother sued to recover the child support that she should have been awarded in support proceedings. In the initial support proceeding, Dr. Bowman had been appointed by the trial court to conduct blood tests. He sent a letter to the court which stated that the blood tests established that the person whom the mother had sued could not be the child's biological father. On the basis of that statement, the court dismissed the support action. It was subsequently determined that Dr. Bowman had improperly recorded

the blood test results, thereby erroneously excluding the defendant as the father. The mother instituted a second support action which the court dismissed when the defendant raised res judicata as a defense. The mother, on behalf of herself and her child, then instituted a civil proceeding against Dr. Bowman based on medical malpractice. The trial court granted Dr. Bowman's preliminary objections in the nature of a demurrer on the basis of the absolute testimonial privilege for communications made in connection with judicial proceedings. The Superior Court concluded that no doubt existed that the communication made by Dr. Bowman occurred in the course of a judicial proceeding. Bowman made the comment directly to the court and the litigants. It was material and relevant to the paternity question at issue. Id. at 601 A.2d at 344.

5. In response to the argument of the mother's counsel that the absolute privilege only applied to defamation actions, the Superior Court in Clodgo said:

> Our precedent is clear. The form of the cause of action is not relevant to application of the privilege. Regardless of the tort contained in the complaint, if a communication was made in connection with judicial proceedings and was material and relevant to it, the privilege applies. Thus, while we agree with appellant's premise that this action is not premised upon defamation but is a medical malpractice action, this does not alter the conclusion that the privilege applies. Id. at 601 A.2d at 345. (emphasis added).

6. The Superior Court indicated that public policy required it to extend the privilege to Dr. Bowman and to other doctors in medical malpractice actions. According to the Superior Court:

> Our review of authority in other states reveals that medical malpractice actions have been instituted on the basis of expert opinions offered in judicial proceedings. If we carve out an exception to the judicial immunity for medical malpractice actions,

> dangerous precedent would result. Experts are called upon to offer medical opinions in a variety of situations in connection with judicial proceedings. An example is a psychiatrist asked to give an opinion of parental competency in a custody action. If we allow medical malpractice actions to survive application of the privilege, we open those experts to potential medical malpractice actions premised upon allegedly incorrect assessments of a parent's mental capacity to care for the children. (citation omitted). Similarly, a doctor who renders an opinion as to another doctor's medical malpractice in a civil action instituted by a patient would be open to claims of malpractice based upon that expert's opinion in the civil action. This simply cannot be allowed as the privilege is necessary to prevent a witness from refusing to testify based on the fear of potential civil liability. The rationale for the immunity applies just as strongly to medical malpractice actions as to any other type of civil action. Accordingly, we cannot allow an exception for the doctrine of judicial immunity where the cause of action contained in the complaint is medical malpractice. Id. at 601 A.2d at 345 and 346.

7. The decision of the Superior Court in Clodgo, supra 601 A.2d 342 compels the dismissal of the Charneys' amended complaint. Dr. Panitz's communication occurred in the context of a trial. She answered a question asked by counsel for the defendants. She uttered her comment directly to the court and the jury. It was material and relevant to the issues in the action. Failure to apply the absolute privilege in this case results in experts like Dr. Panitz being targets of malpractice actions every time they give an opinion on the stand in response to cross-examination which the party that hired them dislikes. Experts would become the guarantors of victory at trial. Every case involving an expert

would have the potential of resulting in a malpractice action against that expert. Many qualified individuals would refuse to testify. Many individuals who did testify might hesitate to tell the absolute truth.

8. The public policy of Pennsylvania bars the amended complaint of the Charneys. The Charneys seek to hold an expert witness responsible for money damages for testifying truthfully whenever the expert's testimony fails to fully support the retaining party's cause of action. The amended complaint does not deny that Dr. Panitz testified truthfully. Nowhere do the Charneys contend that Dr. Panitz provided anything less than completely truthful testimony at trial. All of the courts which have dealt with this issue have unanimously held that an expert has no duty to testify in a certain manner and that contracts which seek to impose such an obligation violate public policy. See Griffith v. Harris, 17 Wisc. 2d 255, 116 N.W. 2d 133 (1962) cert. denied. 373 U.S. 927 (1963); Curtis v. Wolfe, 160 Ill. App. 3d 588, 513 N.E. 2d 1139 (1987) app. denied 118 Ill. 2d 542, 520 N.E. 2d 384 (1988); Schaffer v. Donegan, 585 N.E. 2d 854 (Ohio App. 2 Dist. 1990).

9. Judge Wettick held in Panitz v. Behrend, et al., 141 P.L.J. 203 (1993) that permitting a cause of action against Dr. Panitz based on the conduct alleged by the Charneys' in their amended complaint violates the public policy of Pennsylvania.

10. The Charneys are playing a reprehensible game with the legal system in this case. Their attorneys brought an action in their own right seeking damages as a result of Dr. Panitz's testimony at trial on behalf of the Charneys. Having lost before Judge Wettick, and not willing to wait for the appeal process which they themselves commenced in the Superior Court, they have convinced their clients, the Charneys, to bring an identical action against Dr. Panitz in Westmoreland County, although the exact claim has been denied in Allegheny County. This kind of forum shopping should not be encouraged or permitted.

11. In Count II of their amended complaint the Charneys seek to recover based on economic loss only caused by negligence. The courts of the Commonwealth of Pennsylvania fail to recognize a cause of action for economic loss based on

negligence. See Spivack v. Berks Ridge Corp., Inc., 402 Pa. Super. 73, 586 A.2d 402 (1990).

12. In Count III of their amended complaint the Charneys fail to state a cause of action for negligent misrepresentation. In order to state a cause of action for negligent misrepresentation, there must be a misrepresentation of fact, not statements of opinion. The Charneys base their negligent misrepresentation claim on Dr. Panitz's statement of her expert opinion not on her misrepresentation of fact.

13. The Charneys' claim for negligent misrepresentation also fails because the alleged misrepresentations of Dr. Panitz consists of future facts.

14. A claim for negligent misrepresentation only exists relating to present or past facts.

15. Count IV of the amended complaint of the Charneys fails to state a cause of action for gross negligence. The courts of the Commonwealth of Pennsylvania recognize no such cause of action.

WHEREFORE, defendant Elaine P. Panitz, M.D. respectfully requests that her preliminary objections be granted and that the amended complaint of Charneys be dismissed with prejudice.

MONAGHAN & GOLD, P.C.

BY: /s/
ALAN S. GOLD
Attorney for Defendant,
Elaine P. Panitz, M.D.

7837 Old York Road
Elkins Park, PA 19117
(215) 782-1800

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as the parent and natural guardian of BRIAN CHARNEY, a minor,

Plaintiffs,

v.

ELAINE P. PANITZ,

Defendant.

CIVIL DIVISION

NO. 877 OF TERM, 1993

CODE:

PLAINTIFFS' ANSWER TO PRELIMINARY OBJECTIONS OF DEFENDANT, ELAINE P. PANITZ

Filed on behalf of John Charney, Alice Charney, John Charney, Jr., and Brian Charney, Plaintiffs

Counsel of Record for these parties:

Kenneth W. Behrend
PA I.D. No. 00406

BEHREND AND ERNSBERGER
Firm No. 018

2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

JURY TRIAL DEMANDED

JOHN CHARNEY and ALICE CHARNEY, his wife, and JOHN CHARNEY, JR., their son, and JOHN CHARNEY, as the parent and natural guardian of BRIAN CHARNEY, a a minor,	:	COURT OF COMMON PLEAS
	:	WESTMORELAND COUNTY
	:	
	:	CIVIL ACTION - LAW
	:	
	:	NO. 877 OF TERM, 1993
	:	
	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
ELAINE B. PANITZ,	:	
	:	
Defendant.	:	

PLAINTIFFS' ANSWER TO PRELIMINARY OBJECTIONS OF ELAINE P. PANITZ

AND NOW, come the Plaintiffs, John Charney and Alice Charney, his wife, and John Charney, Jr., their son, and John Charney as the parent and natural guardian of Brian Charney, a minor, by and through their attorney Kenneth W. Behrend and the law firm of Behrend and Ernsberger, and files the following Answer to the Preliminary Objections of the Defendant, Elaine B. Panitz:

1. Paragraph number 1 is admitted insofar as the Plaintiffs did indeed file a amended complaint against the Defendant. Plaintiffs deny the balance of the paragraph as it is an inaccurate characterization of the nature of the Plaintiffs' amended complaint. The Defendant attempts to portray the amended complaint as an action against the Defendant for testifying contrary to promises made beforehand. The amended complaint was filed, instead, for the Defendant's deliberately misleading statements to the Plaintiffs prior to trial which had a serious adverse effect on the Plaintiffs' ability to properly evaluate their own case and in their

and their counsel's ability to make informed decisions and conduct the Plaintiffs' case in a knowledgeable and competent wanner.

2. Paragraph number 2 is admitted in part in that the Defendant did testify in the initial lawsuit brought against a third party. The statement that the Plaintiffs only complain about what the Defendant said (strongly implying that the Plaintiffs objected only to her testimony at trial) is a distortion of the Plaintiffs' case and is denied. The Plaintiffs filed their amended complaint because the Defendant failed to notify or advise the Plaintiffs or their counsel of her true expert opinions prior to giving testimony of such opinions in court. This was particularly improper because the Defendant had represented to the Plaintiffs and their counsel that her opinions were something entirely different from what they were in reality.

3. Paragraph number 3 is admitted in part and denied in part. It is admitted that Judge Wettick issued an opinion on the counterclaim filed by Behrend & Ernsberger. The balance of the paragraph is denied. The Defendant attempts to side-step the true issues in the amended complaint by focusing on the privilege a witness has in testifying at trial. Yet the Plaintiffs have never maintained that the Defendant or any other witness should do anything less than speak their own mind and tell the truth while testifying under oath at trial. The Plaintiffs complain instead that such truthfulness and honesty should also apply to the Defendant's dealings with the Plaintiffs prior to trial.

The Plaintiffs' amended complaint at bar is not identical with the counterclaim of Behrend and Ernsberger, neither in form nor identity of parties. The Plaintiffs, who had little to do with the counterclaim by Behrend and Ernsberger against Dr. Panitz, have not had their day in court although they have been grievously wronged by the Defendant, and so they now bring this amended complaint in the county in which they are domiciled. The Plaintiffs are relying on this Honorable Court to use its own judgment in deciding the merits of the Plaintiffs' case.

4. Paragraph number 4 is not an objection but rather merely an argument and conclusion of law supporting the objection in paragraph 3 and which should be more

properly included in Defendant's supporting brief. As such, no response is required to paragraph 4. To the extent that a response is required, paragraph number 4 is specifically denied. In fact, Defendant's paragraphs 4, 5, 6, and 7 are all arguments and conclusions of law that require no response and they represent a word-for-word recitation of pages 11 through 13 of the Defendant's brief submitted to the Superior Court in the Panitz v. Behrend & Ernsberger case, and is material more properly suited for Defendant's memorandum in law supporting her preliminary objections than the preliminary objections themselves. To the extent that a response is required, plaintiffs specifically deny paragraphs 5, 6 and 7. Plaintiffs will respond more fully to Defendant's paragraphs 4, 5, 6, and 7 in Plaintiffs' memorandum in law supporting Plaintiffs' answers to Defendant's preliminary objections.

5. Paragraph number 8 is specifically denied. The Plaintiffs deny that they seek to hold the Defendant responsible for testifying truthfully. The Plaintiffs instead seek to hold the Defendant responsible for being untruthful prior to testifying. The Defendant, seeking employment by the Plaintiffs, represented to the Plaintiffs her knowledge, skills and opinion to be one thing when, in fact, they were another, or if her opinion had substantially changed prior to testifying, she chose to keep that quiet rather than risk the possibility that the Plaintiffs would be forced to settle on the basis of her adverse opinion and the likelihood that her services would not then be needed. While a witness may not be able to contract to give certain testimony in a court of law, that witness can contract to appear and testify and as such is not at liberty to use fraud or deceit to induce a party to contract for her services. In addition, an expert witness hired by a party to litigation has additional duties to that party besides merely testifying at trial which include giving truthful and frank opinions to the hiring parties and their counsel in order to assist such parties in making informed decisions concerning the conduct of their case. Public policy demands that witnesses not only testify truthfully, but that they deal with the parties to the litigation in a truthful and honest manner even prior to giving testimony. The cases cited by

the Defendant on this issue in paragraph 8 are not on point and are more fully explained in Plaintiffs' accompanying brief in support of this Answer to Defendant's Preliminary Objections.

6. Paragraph number 9 is a continuation of Defendant's objection on public policy grounds delineated in detail in paragraph 8, but is nevertheless admitted insofar as Judge Wettick did express an opinion in Panitz v. Behrend, et al., but it is denied that the Plaintiffs' case at bar violates the public policy of Pennsylvania.

7. Paragraph number 10 is specifically denied. As indicated earlier, the case of Panitz v. Behrend et al., is before the Superior Court and involves this Defendant and Behrend & Ernsberger because this Defendant chose to sue Behrend & Ernsberger and not the Charneys. The Plaintiffs in the present action have a right for redress that was not attended to in the other lawsuit. The Plaintiffs have therefore asserted their right to bring their own action in the county of their domicile to recover damages they have suffered at the hands of the Defendant. This is the first time the Plaintiffs have filed any kind of action against the Defendant and they therefore can not be guilty of "forum shopping" as the Defendant alleges.

8. Paragraph number 11 is specifically denied. This paragraph is an impermissible mixture of objection and argument with case citations. The Plaintiffs are nevertheless compelled to respond to such a convoluted objection.

The Plaintiffs are entitled to economic losses due to the Defendant's negligence. Defendant cites Spivack v. Berks Ridge Corp., Inc., 402 Pa. Super. 73, 586 A.2d 402 (1990) as controlling, yet that case only refers to Aikens v. Baltimore & Ohio Railroad Co., 348 Pa. Super. 17, 501 A.2d 277 (1985), which, when carefully read, objects to the recovery of economic damages in a negligence action without physical injury or damage because the harm caused is usually unforeseeable. The Superior Court went on to say:

> A cause of action exists in this situation only if the tortious interference was intentional or involved parties in a special relationship to one another

(citations omitted).

> [N]egligent harm to economic advantage alone is too remote for recovery under a negligence theory. The reason a Plaintiff cannot recover stems from the fact that the negligent actor has no knowledge of the contract or prospective relation and thus has no reason to foresee any harm to the Plaintiff's interest (citations omitted). Aikens at p.278 & 279.

The foreseeable harm caused by the Defendant's actions, however, were known and obvious to all parties and the Defendant cannot hide behind the plea that the consequences of her actions were too remote to anticipate. See also the Restatement (Second) of Torts Sec. 766C, comments a and b.

9. Paragraph number 12 is denied. The fact that was misrepresented was that she held a particular opinion as well as her representations that she possessed the knowledge and skills necessary to back up her expert opinion. The true facts were that she chose to keep her true opinions to herself and misled the Plaintiffs for her own gain.

10. Paragraph number 13 is denied. The Defendant represented, at a specific point in time, that her opinion was one thing, when in fact, it was something else. The Plaintiffs had a right and a need to know the Defendant's honest expert opinion at that time prior to trial. That is when the negligent misrepresentation was made. The Plaintiffs relied upon and made decisions on the basis of Defendant's representations to their detriment as such representations by the Defendant were false. See the Restatement (Second) of Torts Sec. 552.

11. Paragraph number 14 is a conclusion of law that has no supporting authority or citations and is therefore denied.

12. Paragraph number 15 is denied. Gross negligence consists of the absence of even slight care and performing or failing to perform a duty in reckless disregard of the consequences, and is in accord with Pennsylvania law. Douglas W.

Randall, Inc. v. AFA Protective Systems, Inc., 516 F. Supp. 1122 (1981, E.D. Pa).

WHEREFORE, Plaintiffs respectfully request that the preliminary objections of Defendant Elaine P. Panitz be denied and that the Defendant be ordered to file a Reply to the Amended Complaint.

BEHREND & ERNSBERGER

/s/

Kenneth W. Behrend
Attorney for the Plaintiffs
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Plaintiffs' Answer to Preliminary Objections of Elaine P. Panitz, along with a supporting memorandum of law has been served upon the following counsel of record for the Appellee in the manner set forth below:

Service by First Class Mail
Addressed as follows:

Eugene Mattioni, Esquire
Mattioni, Mattioni & Mattioni, LTD.
399 Market Street, Second Floor
Philadelphia, PA 19106

Alan S. Gold, Esquire
Monaghan & Gold, P.C.
7837 Old York Road
Elkins Park, PA 19117

/s/
Kenneth W. Behrend
Attorney for Appellants

2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

Dated: August 31, 1993

Elaine B. Panitz, M.D.P.A.
Occupational and Environmental Medicine

Telephone
Fax
(609) 448-3737
Telecopier
08520
(609) 924-3051

In Reply:
34 Cleveland Lane
Princeton, NJ 08540

East Windsor Professional
One Mile Road Extension
Hightstown, New Jersey

BY FEDERAL EXPRESS

May 14, 1990

Daniel W. Ernsberger, Esquire
Behrend & Ernsberger
2400 Grant Building
Pittsburgh, PA 15219

Re: Charney v. Crawford Construction et al.
Your File Number: 88-0173

Dear Mr. Ernsberger:

At your request, I have reviewed medical and other records pertaining to each of the Charney family members, including John George Charney II (age 47), Alice Elizabeth Charney (age 37), John George Charney III (age 15), and Brian Richard Charney (age 13), as detailed in Appendix A. On 4/18/90 I obtained a complete medical and occupational history and performed a physical examination on each of the Charney family members, and appropriate laboratory was obtained in the same time frame (see Appendices B-E).

Exposure

Based on my review of available records, and history obtained from the family in person, it is clear that all four family members have suffered chronic exposure to airborne formaldehyde in the 10 Carlisle home. The exposure duration has been 13 years to date (summer 1977 to the present), with initial levels estimated at 0.16 to 0.59 PPM, and current levels (3/8/90) measured at .003-.005 PPM. the airborne formaldehyde has been due to release from a formaldehyde resin in plywood flooring.

DIAGNOSES AND IMPAIRMENTS

John George Charney III (Age 47)

1. History of chronic formaldehyde exposure, 1977 to present, confirmed by elevated IgG (1:32) and IgM (1:16) formaldehyde serum antibodies on 4/26/88.

2. Formaldehyde sensitization, due to 1., manifested by:
   a) Past history of skin rash, eye irritation, respiratory irritation and sensitization, and central nervous system dysfunction.
   b) Organic mental disorder (current).

3. Impairment: His formaldehyde sensitization is permanent and lifelong. His organic mental disorder will continue to cause him difficulty in interpersonal relationships for the indefinite future, jeopardizing both his marriage and his employability (as it has in the past I3 years). He is urged to change residence as soon as possible. He will require an older home, with old or used furnishings, in a rural setting, with no gas heat or air conditioning.

Alice Elizabeth Charney (Age 37)

1. History of chronic formaldehyde exposure, 1977 to present, confirmed by elevated IgG formaldehyde serum antibody

level (1:16) an 2/26/88.

2. Formaldehyde sensitization, due to) 1., manifested by:
   a) Fast history of eye irritation, respiratory irritation and sensitization, gastrointestinal dysfunction, and central nervous system dysfunction.
   b) Respiratory tract sensitization, with small airways dysfunction, confirmed on spirometry (current); organic mental disorder (current); gastrointestinal dysfunction (current).; reproductive dysfunction (current).

3. Impairment: Her formaldehyde sensitization is severe, permanent and lifelong. She is at risk for progression of her respiratory tract sensitization and her organic mental disorder. She is urged to remove herself from the current home on 10 Carlisle Drive. She will require an older home, with old or used furnishings, in a rural setting, with no gas heat or air conditioning. In my opinion, she is totally and permanently disabled from continuous employment due to the presence of formaldehyde in virtually all employment settings. I believe her marriage is also in jeopardy, at least in part due to continued exposure to formaldehyde.

John George Charney III (Age 15)

I. History of chronic formaldehyde exposure, 1977 to present, confirmed by elevated IgM formaldehyde serum antibody level (1:16) on 2/26/88.

2. Formaldehyde sensitization, due to I., manifested by:
   a) Past history respiratory irritation and sensitization, central nervous system dysfunction, and gastrointestinal dysfunction.

b) Respiratory tract sensitization, with small airways dysfunction confirmed by spirometry (current); organic mental disorder (current), gastrointestinal dysfunction (current).

3. Impairment: His formaldehyde sensitization is severe, permanent, and lifelong. He is clearly a depressed child. He is currently having difficulty maintaining attendance and performance at school. In fashion, in my opinion, he will be totally and permanently disabled from continuous employment when he completes schooling, due to the presence of formaldehyde in virtually all employment settings. It is urgent that his continued formaldehyde exposure at 10 Carlisle be terminated, to prevent further deterioration of his central nervous System function. He will require an older home, with old or used furnishings, in a rural setting, with no gas heat or air conditioning.

Brian Richard Charney (Age 13)

1. History of chronic formaldehyde exposure, 1977 to present, with elevated IgM formaldehyde serum antibody level (1.16) an 2/26/88.

2. Formaldehyde sensitization, due to 1., manifested by:

a) Past history of skin rash, respiratory irritation and sensitization, central nervous system dysfunction, and gastrointestinal dysfunction.

b) Respiratory tract sensitization with small airways dysfunction, confirmed on spirometry (current); organic mental disorder (current); gastrointestinal dysfunction (current).

3. Impairment. His formaldehyde sensitization is severe, permanent, and lifelong. Although he appears less depressed than his brother John, he too has been struggling to maintain attendance in his schooling.

In like fashion, in my opinion, he will be totally and permanently disabled from continuous employment upon completion of his schooling, due to the presence of formaldehyde in virtually all employment settings. It is urged that he be removed from the current home on 10 Carlisle Drive, to prevent further respiratory tract sensitization and central nervous system dysfunction. He will require an older home, with old or used furnishings, in a rural setting, with no gas heat or air conditioning.

Future Health Care

All of the Charneys will required frequent supportive medical care, to deal with the continuing skin, respiratory, gastrointestinal, neurologic, and neuropsychological disorders arising from formaldehyde sensitization. In my opinion, Mr. and Mrs. Charney need psychological and marital counseling on an ongoing basis, to deal with the additional stress imposed by their continuing health problems. John III is in urgent need of psychological support at this time, and I believe both children will need cognitive rehabilitation and psychological support as their learning problems cause emotional stress in the future.

Yours truly,

Elaine B. Panitz, MD

EBP/jp
Enclosures